Supreme Court, U.S.
FILED
OCT - 8 1993
OFFICE OF THE CLERK

No. 93-513

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE
AND JOSE MIGUEL BARRIGA GIANOLI

MARIA LUISA DE CASTRO FODEN
AND EDWARD FODEN,
Petitioners
v.
SILVIA GIANOLI ALDUNATE
AND JOSE MIGUEL BARRIGA GIANOLI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH A. CARUSO
Counsel of Record
STEPHEN J. MARZEN
153 East 53rd Street
New York, NY 10022
(212) 848-4000
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court abused its discretion in ordering petitioners to testify and produce documents for use in a proceeding in a court in Chile.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	11
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956) .. 18
California v. *Rooney*, 483 U.S. 307 (1987) 18
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992) 13
Harmelin v. *Michigan*, 111 S. Ct. 2680 (1991) 21
In re Application of Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992) 9, 19-20
In re Court of Commissioner of Patents for Republic of South Africa, 88 F.R.D. 75 (E.D. Pa. 1980) 16-17, 22
In re Letter of Request from Crown Prosecution Service, 870 F.2d 686 (D.C. Cir. 1989) 15
In re Letters Rogatory from the Tokyo District, Tokyo, Japan, 539 F.2d 1216 (9th Cir. 1976) 16
In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989) 9, 19
John Deere Ltd. v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985) 16, 17
Lo Ka Chun v. *Lo To*, 858 F.2d 1564 (11th Cir. 1988) 9, 19
United States v. *New York Telephone Co.*, 434 U.S. 159 (1977) 24
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979) 24

Statutes, regulation and rule:

28 U.S.C.:
§ 1254(1) 2
§ 1782 ..... *passim*
§ 1782(a) 8, 13, 16
Chilean Civil Code:
Art. 2155 25
Art. 2163(7) 25
Chilean Code of Civil Procedure:
Art. 274 25
Art. 862 24

TABLE OF AUTHORITIES—Continued

	Page
22 C.F.R. § 92.67(a)	24
Fed. R. Civ. P. 26(b)(1)	15
Miscellaneous:	
Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965)	14-15
Hans Smit, *Introduction* to INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE (H. Smit ed. 1965)	14
S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782	8-9, 13-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-513

IN RE: APPLICATION OF SILVIA GIANOLI ALDUNATE AND JOSE MIGUEL BARRIGA GIANOLI

MARIA LUISA DE CASTRO FODEN AND EDWARD FODEN,

Petitioners

v.

SILVIA GIANOLI ALDUNATE AND JOSE MIGUEL BARRIGA GIANOLI

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is not yet reported. The decision of the district court (Pet. App. A20-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1993. The petition for a writ of certiorari was filed on September 30, 1993. The juris-

diction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises out of a Chilean court's order to compile an inventory of the assets of Ciro Gianoli Martinez, a citizen and resident of Chile. The Chilean court provisionally declared Mr. Gianoli mentally incompetent and appointed respondents, his daughter and grandson, as his provisional guardians. Respondents (the "Guardians") filed an *ex parte* application in the United States district court for judicial assistance under 28 U.S.C. § 1782 in order to obtain evidence from petitioners for use in compiling the inventory ordered by the Chilean court. The Guardians' application alleged that approximately $8 million of Mr. Gianoli's cash and securities had vanished after bank statements and stock certificates relating to those assets were sent to petitioners.

The United States district court granted the Guardians' application and rejected petitioners' subsequent motion to vacate the court's order and quash subpoenas served on them by the Guardians. The court of appeals affirmed.

1. On December 21, 1935, Ciro Gianoli Martinez married Elena Aldunate Lynch. The couple had four children, two of whom are still living. Respondent and Provisional Guardian Silvia Gianoli Aldunate is one of Mr. Gianoli's living daughters. Respondent and Provisional Guardian José Miguel Barriga Gianoli is the son of one of the deceased daughters.

Mr. Gianoli and his wife began to live apart many years ago, but they remained married under Chilean law. For approximately the last 12 years, Mr. Gianoli has lived with a woman named Ana Eguiguren Rozas ("Ana Eguiguren"). Petitioner Maria Luisa Foden

is the daughter of Ana Eguiguren. Petitioner Edward Foden is the husband of Maria Luisa Foden and Ana Eguiguren's son in law. J.A. 243 ("J.A." signifies the joint appendix in the court of appeals.)

Mr. Gianoli personally controlled his financial affairs until about 1989. He also had consistent and regular contact with his daughters, other family members and friends until about 1989. Beginning in that year, however, Ana Eguiguren prevented Mr. Gianoli's daughters, other family members, and most of his close friends from seeing or speaking to him. J.A. 13-14. Although Mr. Gianoli repeatedly told one of his nurse's aides that he wanted to see his daughters, Ana Eguiguren refused Mr. Gianoli access to a telephone, locked away his telephone book, told him that his family had abandoned him, and forced him to sign documents—holding and guiding his hand and making him practice his signature. J.A. 31-35.

2. On April 9, 1992, all of Mr. Gianoli's living descendants commenced a proceeding before the Third Civil Judicial District Court of First Instance in Chile and requested that the court declare Mr. Gianoli mentally incompetent and appoint a guardian for him. On April 27, 1992, the court personally visited Mr. Gianoli at his home. It found him "in a state of semi-sleep" and unable to respond when asked about his own name, "although he tried to." J.A. 67. A court-appointed physician determined that Mr. Gianoli is "senile," "permanently and totally prostrate in a surgical bed," and "total[ly] dependen[t] on third parties for his sustenance and general care, as well as for his survival." J.A. 72-73.

Ana Eguiguren opposed the relief requested by Mr. Gianoli's descendants. She maintained that Mr.

Gianoli is competent. In support of her opposition, Ana Eguiguren submitted an affidavit ostensibly signed by Mr. Gianoli and dated December 31, 1990. The affidavit purports to give Ana Eguiguren control over Mr. Gianoli's health and care if he becomes unable to "manifest his will," states that his relatives are "not to visit him," and purports to authorize Ana Eguiguren to determine who may visit him. J.A. 78-106.

On May 22, 1992, over Ana Eguiguren's opposition, the Chilean court provisionally determined Mr. Gianoli to be mentally incompetent. On May 25, 1992, the court appointed the respondents provisional guardians of Mr. Gianoli. The court further ordered that, "[i]n due time, a certified inventory of the property of the ward must be conducted." J.A. 127.

On Ana Eguiguren's appeal, the Chilean Supreme Court affirmed. J.A. 136.

3. On October 27, 1992, consistent with the order of the Chilean court requiring the inventory of Mr. Gianoli's assets, the Guardians applied *ex parte* to the United States District Court for the District of Connecticut for an order of judicial assistance under 28 U.S.C. § 1782. Section 1782 provides, in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .

The Guardians asked the district court to order petitioners to "provide any documents they have and . . . [to] give testimony concerning the assets of Casabianca," a Panamanian corporation founded and beneficially owned by Mr. Gianoli, "and the current whereabouts of those assets." The Guardians sought additional evidence from petitioners about the location of other assets belonging to Mr. Gianoli. J.A. 27-28.

In support of their application, the Guardians submitted the affidavit of George E. Deren, an investigator retained by the Guardian's counsel. Mr. Deren's investigation revealed that:

> The [petitioners] effectively took control of Casabianca. Millions of dollars in cash passed out of Casabianca after they became involved in Casabianca's affairs. Millions of dollars in securities passed out of Casabianca and into [petitioner] Edward Foden's hands. These assets have now disappeared. It is especially appropriate that the [petitioners] account for these assets because they were fiduciaries of Casabianca, or at least they claimed to be fiduciaries, [petitioner] Edward Foden having been named a director at or about the time he received the stock certificates from Fahnestock [& Co., a national brokerage firm] and [petitioner] Maria Luisa Foden claiming to be the attorney for Casabianca when she received monies from Fahnestock.

J.A. 27. Further investigation showed that Casabianca owned gold on depcsit at the Bank of Nova Scotia in New York, that Casabianca's gold was transferred to Switzerland, and that petitioner Maria Luisa Foden was personally involved in those transfers. J.A. 294.

4. On March 8, 1993, the United States District Court for the District of Connecticut (Cabranes, C.J.) denied petitioner's motion to vacate the court's order granting judicial assistance and denied petitioners' motion to quash subpoenas served on them by the Guardians. Pet. App. A20-A24.

After quoting 28 U.S.C. § 1782, the district court observed that "[i]t is clear . . . that all the requirements of section 1782 are met in this case." Pet. App. A22. The court noted that "[t]here is no dispute" that petitioners reside in the District of Connecticut; that the Guardians are "interested persons" within the meaning of 28 U.S.C. § 1782; and that the Guardians have been ordered by the Chilean court to conduct an inventory of Mr. Gianoli's assets. Pet. App. A22. The court further noted that "[t]here is abundant evidence in the record that the [petitioners] are or may be in possession of relevant information on the assets of Ciro Gianoli and should be subject to discovery." *Id.*

The district court rejected petitioners' contention that the subpoenas should be quashed because the information sought by the Guardians would not be available in Chile. Pet. App. A22-A23. To begin with, the court pointed out that "nothing in the text of section 1782 . . . requires that the law of the foreign tribunal provide for discovery of the information sought in the United States." *Id.* at A23. To the contrary, petitioners "are asking this court to impose a requirement that is not set forth in the text of section 1782." *Id.*

"In any event," the court found that "the law of Chile empowers the provisional guardians to obtain the information about Ciro Gianoli's assets." Pet.

App. A23. The district court explained that "[i]t is difficult, if not impossible, to conclude that a court that orders an inventory of this sort does not have the power to inquire into assets abroad so that the required inventory can be complete." *Id.* at A23-A24.

Finally, the district court found it "clear from the record that obtaining the information from the [petitioners] would not be an affront to the Chilean court or the Chilean sovereignty." Pet. App. A24. To the contrary:

> It is clear that allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings. In fact, the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken.

Id.

5. On appeal, the United States Court of Appeals for the Second Circuit affirmed. It held first, that "section 1782 does not require the district court to make a finding of discoverability under the laws of the foreign jurisdiction"; and second, that the district court did not abuse its discretion in granting the judicial assistance requested by the Guardians. Pet. App. A6.

The court of appeals began with "the language of the statute." Pet. App. A10. It noted that "[t]he statutory language is unambiguous in its requirements" and "makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction." *Id.* Indeed, the court of appeals observed that "the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements

of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court '*may* be in whole or part the practice and procedure of the foreign country or the international tribunal.'" Pet. App. A10-A11 (quoting 28 U.S.C. § 1782(a); emphasis court's). The court of appeals explained that it was "not free to read extra-statutory barriers to discovery into section 1782." Pet. App. A11. Accordingly, it rejected petitioners' contention that § 1782 contains an "implicit" requirement that the material requested in the district court be discoverable under the laws of the foreign jurisdiction. Pet. App. A9.

The court of appeals reasoned that § 1782 does not require a "threshold showing" that the discovery sought in the district court would be available under the laws of the foreign jurisdiction, Pet. App. A3, but gives district courts authority to consider foreign practices in exercising their "wide discretion" under the statute. Pet. App. A12. In support of its reasoning, the court of appeals quoted the Senate Report on the bill that became 28 U.S.C. § 1782:

> [Section 1782(a)] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.

Pet. App. A12 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788). In view of the broad grant of discretionary power and the legislative history discussing the factors relevant to the exercise of that power, the court of appeals concluded that "district judges may well find that in appropriate cases a determination of discoverability under the laws of the foreign jurisdiction is a useful tool in their exercise of discretion under section 1782." Pet. App. A12-A13. The court of appeals held, however, that "no such threshold requirement exists in the statute." *Id.* at A13.

The court below recognized that the court of appeals for the First and Eleventh Circuits had stated that § 1782 contains an "implied discoverability requirement" in order to maintain a balance between litigants in foreign proceedings, to prevent circumvention of foreign restrictions on discovery, and to avoid giving offense to foreign tribunals. Pet. App. A13-A14 (discussing *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); and *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989)). The court below agreed that those policy considerations were proper factors for district courts to consider in the exercise of their discretion, but it disagreed that those policies required the judiciary to create a threshold foreign discoverability requirement. Pet. App. A13-A14.

After concluding that § 1782 authorized the judicial assistance sought by the Guardians, the court of

appeals next determined that the district court did not abuse its discretion in granting the Guardians' application. Pet. App. A15-A18. The court of appeals sustained the district court's findings that the Chilean court had the power to discover assets abroad to complete the required inventory; that Chilean law allowed discovery through methods lawful in the jurisdiction where discovery takes place; and that the discovery here would by no means be an affront to the Chilean court because it would allow that Guardians to complete the inventory ordered by the Chilean court. *Id.* at A17-A18. "In this way the district court assured that section 1782's purposes, especially that of encouraging international cooperation, were being furthered by the court's actions and not hindered." Pet. App. A17. The court of appeals rejected petitioners' "parade of horribles" argument because the imagined parade would not materialize: "district courts, in exercising their discretion, are not free to ignore the purposes underlying the statute." *Id.* at A18.[1]

---

[1] The court of appeals also rejected petitioners' argument that § 1782 limited discovery to "adjudicative proceeding[s]" as being "without merit." Pet. App. A18. Quoting the language of § 1782, the court held that "[t]he evidence sought in the district court pursuant to the order of the Chilean court is clearly 'for use in' the proceeding." Pet. App. A18. Petitioners do not challenge that ruling in this Court.

ARGUMENT

The judgment below is correct and does not warrant further review. The court of appeals correctly determined that 28 U.S.C. § 1782 does not require the Guardians to make a threshold showing that the materials they seek would be discoverable in Chile. The court below also correctly determined that, on the facts of this case, the discovery granted was well within the discretion of the district court.

For more than 20 years, courts and commentators agreed that § 1782 does not condition a grant of judicial assistance on discoverability in the foreign jurisdiction, although it permits the district court to consider that fact in exercising its discretion whether or not to grant discovery and on what terms. In the last few years, however, courts of appeals in the First and Eleventh Circuits have stated that applicants for judicial assistance under § 1782 must make a threshold showing that the material they seek would be discoverable in the foreign jurisdiction. Although the language of those opinions is in tension with the decision below, it does not suggest the need to review the decision below, for three reasons.

First, the foreign discoverability issue is of little practical significance. The issue has arisen in fewer than half a dozen cases in almost 30 years since § 1782 assumed its current form.

Second, the tension between the decision of the Second Circuit below and the opinions of the First and Eleventh Circuits is not *whether* to examine foreign discoverability, but *when*. The Second Circuit held that foreign discoverability should be considered by the district court in making its decision whether or not to grant discovery and on what

terms. The First and Eleventh Circuits stated that foreign discoverability must be determined at the threshold. Application of the Second Circuit's standard would not have dictated a different result in the cases decided by the First and Eleventh Circuits.

Third, the First and Eleventh Circuits may reconsider the statements in their opinions in a proper case. Their opinions focused on whether or not to consider foreign discoverability, not when that factor should enter into the district court's discretionary decision. In light of the Second Circuit's decision below, the First and Eleventh Circuit may (and should) conclude that foreign discoverability is not a threshold precondition to a grant of judicial assistance under 28 U.S.C. § 1782 but is one factor for consideration by the district court. Upon reconsideration, the First and Eleventh Circuits may clarify the proper stage at which the district court is to consider foreign discoverability, thereby obviating the need for this Court's review. In the meantime, it would be premature for this Court to grant review of the decision below.

Finally, even if this Court were inclined to decide whether § 1782 requires a threshold showing of foreign discoverability, this case is not a suitable vehicle for resolving that question. The Guardians demonstrated in the district court and the court of appeals that the discovery sought would be available to them under the laws of Chile. The judgment in this case, therefore, does not turn on whether § 1782 implicitly requires that material be discoverable under the laws of the foreign jurisdiction.

1. It has been undisputed for more than 20 years that 28 U.S.C. § 1782 does not require the applicant

for judicial assistance to make a threshold showing that the material sought would be discoverable in the foreign jurisdiction if the parties and evidence were located there. "In a statutory construction case, the beginning point must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). The text of § 1782 gives a broad grant of discretion to the district court, which "may" order a person "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." In exercising its discretion, the district court may grant or deny the application and "prescribe the practice and procedure, which may be in whole or in part the *practice* and procedure *of the foreign country or the international tribunal.*" 28 U.S.C. § 1782(a) (emphasis added). As the court below correctly held, the "unambiguous" (Pet. App. A10) text makes plain that foreign practice—including foreign discoverability—is not as threshold barrier to judicial assistance, but simply a factor to be considered by the district court in the exercise of its discretion to grant or deny the application and to impose the terms and conditions on which discovery may proceed.

The legislative history confirms that foreign discoverability is a factor for the district court to consider in the exercise of its discretion and not a precondition to an award of judicial assistance. The Senate Report (quoted *supra* at 8-9) states that the district court, in exercising its discretion whether or not to grant judicial assistance and on what terms, may consider the "character of the proceedings in [the foreign] country." S. Rep. No. 1580, 88th Cong., 2d Sess. 7, *reprinted in* 1964 U.S.C.C.A.N. at

3788. The "character" of the foreign proceedings includes the discovery practices in those proceedings. Since the Senate Report includes that factor as one to be considered by the district court in exercising its discretion, foreign discoverability is plainly not a threshold requirement for judicial assistance.

Informed commentators have likewise long understood that § 1782 does not impose a threshold requirement of foreign discoverability, but rather leaves that consideration to the discretion of the district court. In 1965, Professor Hans Smit of the Columbia Law School explained that § 1782 would typically provide greater discovery than that available from foreign tribunals:

> The liberal assistance provided by American courts may well give the foreign court or litigant a *more effective device* of compelling the production of tangible evidence in the United States *than is available in the foreign country.*

Hans Smit, *Introduction* to INTERNATIONAL CO-OPERATION IN LITIGATION: EUROPE 8 (H. Smit ed. 1965) (emphasis added). To illustrate the point that § 1782 provides discovery in excess of that allowed in the foreign jurisdiction, Professor Smit used the example of party statements:

> Under new Section 1782, the district court may order the taking of both testimony and statements. Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, *Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard.*

Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965) (emphasis added). According to Professor Smit, § 1782 often provides greater discovery than would be permitted in the foreign proceeding. The converse of that proposition, of course, is that foreign discovery practices do not place a ceiling on the judicial assistance available under 28 U.S.C. § 1782.

Professor Smit's thoughtful views of § 1782 merit close consideration. As then-Judge Ginsburg explained in *In re Letter of Request from Crown Prosecution Service*, 870 F.2d 686, 689 (D.C. Cir. 1989), Professor Smit "was the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782." [2]

Petitioners' contention that § 1782 "appears directed not to discovery, but to the production of admissible evidence" (Pet. 10) rests on a false dichotomy between discovery of evidence and its use in a proceeding. The ultimate purpose of discovery is to produce admissible evidence, or as Federal Rule of Civil Procedure 26(b)(1) puts it, to be "reasonably calculated to lead to the discovery of admissible evidence." Petitioner is therefore wrong to suggest

---

[2] Professor Smit functioned as the Director of the Project on International Procedure at the Columbia Law School beginning in June 1960. He also acted as the Reporter to the United States Commission on International Rules of Judicial Procedure, a body created by Congress first to study United States rules relating to litigation with international aspects, then to propose appropriate legislative reforms. The Commission's proposals [were] all . . . accepted by Congress without change. . . .

In re Letter of Request from Crown Prosecution Service, 870 F.2d at 690 n.2 (Ginsburg, J.).

that the discovery right in § 1782 is "implied." Pet. 11. That right is granted expressly in the statute's grant of authority to the district court to order testimony or document production "for *use* in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a) (emphasis added); see *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136-37 (3d Cir. 1985) (reversing a district court's refusal to grant discovery under § 1782 which was based, in part, on the district court's erroneous view that the material sought must itself be admissible evidence); *In re Letters Rogatory from the Tokyo District, Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (evidence may be used in preliminary stages of a foreign proceeding even though not admissible at trial).

2. For more than 20 years, no court considering an application for judicial assistance under § 1782 required a threshold showing of foreign discoverability. Instead, foreign discoverability was considered by the district court in the exercise of its discretion. For example, in *In re Court of Commissioner of Patents for Republic of South Africa*, 88 F.R.D. 75 (E.D. Pa. 1980), the district court denied a request for judicial assistance under 28 U.S.C. § 1782 filed by a party to patent litigation in South Africa. Although the district court recognized that it had the power to grant discovery, it declined to do so in the exercise of its discretion:

> The statute empowers this Court to order discovery in this case, and that [the party seeking discovery under § 1782] as an "interested person" may properly apply for such an order. It is, however, equally clear from the legislative history of this statute that this is an inappro-

> priate case for such an exercise of apparently broad discretion.

88 F.R.D. at 77. The district court declined to grant judicial assistance, in part because the party seeking discovery could not represent that the documents and testimony it sought would be "discoverable under South African law." *Id.*

The Third Circuit cited the *South African Patents* decision with approval in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (1985). In *John Deere*, the Third Circuit reversed the district court's refusal to grant judicial assistance under 28 U.S.C. § 1782. Although the court of appeals explained that its decision "does not countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals," it is clear in context that its statement requires not a threshold showing of foreign discoverability, but rather the appropriate exercise of the district court's discretion on the facts of a given case. *Id.* at 136. That much is clear from the Third Circuit's reliance on the *South African Patents* decision, which recognized the district court's discretion to grant judicial assistance regardless of foreign discovery practices, and the court of appeals' elaborate footnote describing the discretion vested in the district court. *Id.* at 136 n.3.[3]

3. It is true that three recent opinions of the First and Eleventh Circuits state that the district court must determine at the threshold whether material sought under 28 U.S.C. § 1782 would be discoverable in the foreign jurisdiction. Although those state-

---

[3] Thus, contrary to petitioners' contention (Pet. 8-9), and as the court below pointed out (Pet. App. A14-A15), the Third Circuit did not hold that § 1782 requires a threshold determination of foreign discoverability.

ments are in tension with the decision of the court below, this Court reviews judgments, not statements in opinions. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956); see *California* v. *Rooney*, 483 U.S. 307, 311 (1987). The judgment of the Second Circuit below is not inconsistent with the judgments of the First and Eleventh Circuits. The First and Eleventh Circuits created a threshold discoverability requirement to protect U.S. parties to foreign litigation and to prevent circumvention of foreign discovery practices. Exactly the same judgments reached in First and Eleventh Circuits would be reached in the Second Circuit by the proper exercise of the district court's discretion.

The opinions of the First and Eleventh Circuits can also be reconciled with that of the Second Circuit below. The opinions of the First and Eleventh Circuits focused virtually exclusively on *whether* to consider foreign discoverability, rather than *when* the district court should consider that factor—at the threshold or in the exercise of the court's discretion. In contrast, the Second Circuit agreed with the need to consider those "policy considerations," but concluded that "Congress intended that these concerns be addressed by a district judge's exercise of discretion." Pet. App. A13-A14. Since the First and Eleventh Circuits have not confronted the precise question decided by the Second Circuit below—namely, *when* should the district court consider foreign discoverability in ruling on an application for judicial assistance under 28 U.S.C. § 1782—it is premature to conclude that the circuits are divided. A brief description of the First and Eleventh Circuit opinions lays bare the superficial nature of the purported conflict.

The earliest decision supposedly in conflict with the decision below is *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989). In that case, a panel of the Eleventh Circuit affirmed a district court's order granting judicial assistance and held that § 1782 did not require the foreign proceeding to be pending at the time of the application. *Id.* at 1152, 1154-56. Although the panel affirmed the grant of judicial assistance, it noted, in its penultimate paragraph, that "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance." *Id.* at 1156. The panel's dictum was entirely unnecessary to, and had no effect on, the judgment in that case. In addition, the panel did not consider whether foreign discoverability should be a threshold consideration or a factor for the district court to consider in the exercise of its discretion.

A few months later, another panel of the Eleventh Circuit quoted the *Trinidad and Tobago* dictum and remanded for a determination whether the evidence sought in the application for judicial assistance would be discoverable in the foreign jurisdiction. *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (1988). The panel rested the foreign discoverability requirement entirely on the *Trinidad and Tobago* dictum. Like that earlier dictum, the panel's two-page opinion did not consider whether foreign discoverability should be considered at the threshold or as an element in the exercise of the district court's discretion. *Id.*

Lastly, in *In re Application of Asta Medica, S.A.*, 981 F.2d 1 (1992), the First Circuit reversed a district court's grant of judicial assistance to a foreign

corporation seeking testimony and documents for use in foreign patent proceedings against an American corporation. The panel required "a threshold showing that the information would be discoverable in the foreign jurisdiction if located there," in order to prevent the foreign corporation from gaining an "unfair advantage" over the American corporation and from "circumvent[ing] foreign law and procedures." *Id.* at 6. The panel did not focus on whether foreign discoverability should be considered at the threshold or in the exercise of the district court's discretion. Indeed, the panel's statement that absence of a threshold requirement would open "the floodgates . . . for unlimited discovery" (*id.* at 5) suggests that it was not aware that insufficient attention to foreign discoverability by the district court could constitute an abuse of discretion.

It is plain that the opinions of the First and Eleventh Circuits do not represent a considered judgment that foreign discoverability should be taken account of at the threshold rather than in the exercise of the district court's discretion. Those decisions thus do not conflict with the decision of the Second Circuit below that foreign discoverability should be considered at the latter stage. To be sure, the language of the First and Eleventh Circuits is in tension with that of the Second Circuit, but sound judicial administration suggests that the First and Eleventh Circuits be given the opportunity to reconsider their statements in light of the decision of the Second Circuit and to clarify their view of the proper time when foreign discoverability enters into the decision on an application for judicial assistance under 28 U.S.C. § 1782. If the First and Eleventh circuits join the Second Circuit, no further review will be

required by this Court. If those circuits reject the holding of the Second Circuit, those later decisions will provide an appropriate occasion for this Court's review. The fact that the foreign discoverability requirement has arisen in fewer than half a dozen cases in almost 30 years demonstrates that there is no immediate need for this Court's review.

4. In support of their petition for a writ of certiorari, petitioners predict, as they did in the court below, a "parade of horribles." Pet. App. A18. Specifically, petitioners contend that absence of a threshold foreign discoverability requirement will (1) discourage foreign countries from cooperating in international discovery; (2) put U.S. parties to foreign litigation at a disadvantage; and (3) place an undue burden on the district courts. Pet. 12-17. As has been pointed out elsewhere, however, the strength of the parade-of-horribles form of argument "is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize." *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2697 n.11 (1991) (Scalia, J.). Here, no parade will materialize because the permit to march lies within the sound discretion of the district court.

Petitioners' argument presupposes that, without a threshold requirement of foreign discoverability, district courts will rubber stamp applications for judicial assistance—ignoring the sensibilities of foreign sovereigns, the predicament of U.S. parties to foreign litigation, and the demands on their own resources. Petitioners' hypothesis is inherently unbelievable. Moreover, it is contradicted by more than 20 years of experience. From 1964 (the year 28 U.S.C. § 1782

became law in its current form) until 1988 (when the Eleventh Circuit first broached a foreign discoverability requirement) the federal district courts managed to entertain applications for judicial assistance under § 1782 without requiring applicants to make a threshold showing of foreign discoverability and without the ills petitioners predict. The reason for their success is obvious: their discretion to grant or deny requests for assistance and to impose terms and conditions on the discovery they allow. When particular applications for assistance have posed the threats imagined by petitioners, as in the *South African Patents* litigation, district courts have simply refused to grant the requested relief, or have done so on terms consonant with the purposes of the statute. Although petitioners assert that "[t]his retreat to the discretion of individual judges is simply unworkable" and without a "standard" (Pet. 14), petitioners can point to no empirical problems in the exercise of the district court's discretion or in the court of appeals' review of their decisions under the familiar "abuse-of-discretion" standard. Indeed, if the abuse-of-discretion standard is "unworkable," as petitioners say (Pet. 14), this Court has far greater problems than the administration of judicial assistance under 28 U.S.C. § 1782.[4]

Far from avoiding problems in relations with foreign sovereigns and in the administration of the U.S. judicial system, petitioners' categorical refusal to grant assistance absent proof of foreign discoverabil-

---

[4] Nor is there any reason to fear that federal district courts will become preoccupied supervising discovery under § 1782. The statute provides that the district court "may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court."

ity would create those very problems, especially in requests for assistance from "foreign or international tribunal[s]." 28 U.S.C. § 1728. The foreign discoverability requirement advocated by petitioners would require the federal district courts to turn a blind eye to requests in aid of foreign criminal prosecutions or administrative proceedings any time the evidence would not be discoverable under the practice of that country.

This case well illustrates Congress's wisdom in entrusting decisions under § 1782 to the district courts rather than enacting a foreign discoverability requirement. In this case, petitioners seek to prevent the Guardians appointed by a Chilean court from compiling the inventory ordered by that court, despite the fact (found by the district court and undisputed by petitioners) that "allowing the depositions to proceed would actually assist the Chilean court in its ongoing proceedings." Pet. App. A24. Petitioners contend (Pet. 15 n.6) that Chile will be "offended" by discovery here, even though, as the district court found (Pet. App. A24), the law of Chile does not prohibit a litigant from gathering evidence through methods that are lawful in the place where those methods are undertaken. The adverse effects of a foreign discoverability requirement in this and other cases further confirms that such a requirement should not be read into § 1782.

Petitioners urge that the rule adopted by the court below will "impose U.S. procedures capriciously on some but not all parties to the foreign proceeding" and will "unfairly disadvantage U.S. litigants in foreign proceedings." Pet. 4. Those concerns are academic here. Petitioners are not "parties" to or "litigants" in the Chilean incompetency proceeding. In-

deed, petitioners claim to be beyond the jurisdiction of the Chilean courts. The Guardians can hardly be faulted for seeking relevant evidence in the jurisdiction in which the witnesses reside.

5. Even if the Court were inclined to consider whether § 1782 should be read to require a threshold showing of foreign discoverability, resolution of that question would not affect the outcome of this case because the information sought by the Guardians would be discoverable in Chile.[6]

Contrary to petitioners' insinuation (Pet. 15 n.6), the courts below did not endow the Guardians "with powers broader than are given to them by virtue of their appointment in Chile." As the district court found (Pet. App. A23-A24), and as petitioners do not dispute, Article 862 of the Civil Procedure Code of Chile authorizes the Chilean court to issue letters rogatory to inquire about Mr. Gianoli's assets. Thus, Chilean law plainly provides for discovery of the information requested by the Guardians from petitioners. Enforcement of letters rogatory is governed by the laws of the receiving nation (here, the United States), see 22 C.F.R. § 92.67(a), and compulsory process is available under U.S. law.

Even if the foreign discoverability requirement is based entirely on the practice within the foreign juris-

---

[5] Although the court of appeals did not rest its decision on this alternative ground, the Guardians pressed the point in the district court (J.A. 410-14) and the court of appeals (Brief for Appellees Silvia Gianoli Aldunate and José Miguel Barriga Gianoli 24-31). The Guardians are entitled to defend the judgment of the court below on any ground raised below, whether relied on by the court or not. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

diction, the Guardians still satisfy the requirement. If petitioners were within the jurisdiction of the Chilean court, and refused to provide testimony and documents, the Guardians would be entitled to compel discovery by means of at least three ancillary proceedings. First, the Guardians could file a proceeding called a "prejudicial measure." Under § 274 of the Chilean Civil Procedure Code, a Chilean court could impose a fine and/or arrest petitioners if they refused to comply with a letter rogatory requesting information to complete the inventory. J.A. 411.

Second, the Guardians could begin an "ordinary proceeding" against petitioners if they were within the jurisdiction of the Chilean court and refused to comply with a letter rogatory. J.A. 412.

Third, the Guardians could obtain discovery from petitioners by means of an accounting. J.A. 412. Petitioners claimed to act as agents of Mr. Gianoli (one petitioner as his attorney and the other as a director of a corporation he founded and beneficially owned). Under Chilean law, when Mr. Gianoli became incompetent, petitioners' agency terminated by operation of law, Chilean Civil Code, Art. 2163(7), and petitioners are required to give an accounting to Mr. Gianoli (and, in his stead, to his Guardians), *id.*, Art. 2155. Thus, it is undisputed that the Guardians could obtain by way of an accounting in Chile precisely the same information they seek from petitioners in Connecticut—assuming, of course, that petitioners were within the jurisdiction of the Chilean court. J.A. 412.[6] Since Chilean law would empower the

[6] Petitioners maintain that an "accounting" is not "discovery." J.A. 412. Although the label is different, the function is the same. Chilean law provides that the subject of Mr. Gianoli's assets is a fit and proper matter for inquiry and

Guardians to obtain testimony and documents from petitioners if they were located in Chile, the judgment below does not turn on whether or not 28 U.S.C. § 1782 implicitly conditions judicial assistance on a showing that discovery could be obtained in the foreign jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH A. CARUSO
Counsel of Record
STEPHEN J. MARZEN
153 East 53rd Street
New York, NY 10022
(212) 848-4000
Counsel for Respondents

OCTOBER 1993

---

empowers the Guardians to compel production of the information they seek. That satisfies any "discoverability" requirement.